

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF DEL NORTE

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JUL 21 1999

THE PEOPLE OF THE STATE OF CALIFORNIA,)	SUPERIOR COURT OF CALIFORNIA COUNTY OF DEL NORTE
)	
Plaintiff,)	
vs.)	No. 97-268-X
)	
ELLIOTT SCOTT GRIZZLE, (H-10106),)	
)	
Defendant.)	
)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

ON MOTION FOR NEW TRIAL/SENTENCING

Had in the Superior Court of the State of California
in and for the County of Del Norte, beginning at 9:04
O'Clock, A.M., Wednesday, June 16, 1999. Before the:

Honorable ROBERT W. WEIR, Judge thereof

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APPEARANCES

For the People:

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County of Del Norte
County Courthouse
Crescent City, California 95531
By: JAMES FALLMAN
Deputy District Attorney

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Reported by: Lorraine Kaye O'Hara, CSR No. 5637, RPR

COPY

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1 CRESCENT CITY, CALIFORNIA, WEDNESDAY, JUNE 16, 1999, 9:04 AM

2 ---oo---

3 THE COURT: All right, the People of the State of
4 California versus Elliott Grizzle, Case No. 97-268-X. We
5 are present in court with the defendant, defense counsel Mr.
6 Clanton and the District Attorney. We are before the Court
7 on the defendant's motion for new trial, and then depending
8 on the outcome of that, either setting it for a new trial or
9 proceeding to sentencing.

10 Are we ready to proceed?

11 MR. FALLMAN: Yes, your Honor.

12 MR. CLANTON: Well, your Honor, I -- I do not believe
13 that we are at this moment. As the Court's aware, there is
14 an additional witness that we requested and the Court signed
15 a transport order on, Mr. Molina. According to C.D.C. he is
16 en route and the Court indicated I would have the
17 opportunity to speak with Mr. Molina prior to the beginning
18 of this proceeding this morning.

19 THE COURT: Well, I thought that was before -- before
20 putting him up on the stand. There are other witnesses we
21 could take care of, right?

22 MR. CLANTON: That's correct. However, there is
23 another event that took place last evening, your Honor, and
24 that the Attorney General's Office, vis-a-vis James Petzke,
25 faxed to me at 6:30 last evening a copy of a transcript of a
26 meeting that he had with Mr. Clark on January 5th, 1999 I
27 believe it was, and I'm in the process of getting the trial
28 transcript portions which were just faxed to me --

1 THE COURT: Uh-huh.

2 MR. CLANTON: -- that relate to that transcript, and
3 inasmuch as I'd requested that transcript sometime earlier,
4 and given the fact that it just got to us -- just got here
5 last night and I just received the trial transcripts by fax
6 to my office, I need to have the opportunity to review those
7 just briefly and I would ask the Court for that time.

8 I need to put on the record as well, your Honor,
9 given these comments as well as some comments that were
10 delivered through a telephone conference between Mr.
11 Fallman, the Court and myself, I believe it was on Monday
12 morning that I had requested a continuance in order to talk
13 to Mr. Molina. That was information that we had received
14 only on June 11th of this year -- of this month and that we
15 attempted to see Mr. Molina with the -- with the assistance
16 of Dan Smith from the Internal Affairs Office of C.D.C.
17 who's present here this morning. He intervened for us and
18 we were in fact granted the opportunity to talk to Mr.
19 Molina on Monday; however, two flights that we had available
20 to us in order to make that were canceled out of the
21 McKinleyville airport. We were not able to talk to Mr.
22 Molina and that is when I contacted the Court on a telephone
23 conference requesting a continuance. The Court indicated it
24 would not grant that continuance. That was off the record.
25 I want to make sure that that's on the record, and if
26 there's any discrepancies, certainly counsel and the Court
27 can --

28 THE COURT: Well, I did indicate I'd give you a

1 again, I think that that is a -- an issue which needs to be
2 taken into account by the Court in granting our motion for
3 new trial.

4 Your Honor, if I have -- may have just a moment.

5 (A brief pause in the proceedings.)

6 THE COURT: Actually this might be a good time for a
7 break. We'll recess for ten minutes.

8 MR. CLANTON: That's fine, your Honor. Thank you.

9 (A brief recess was taken.)

10 THE COURT: We're again in session with both parties
11 and defendant. You may continue.

12 MR. CLANTON: Your Honor, I initiated my interview
13 with Mr. Molina. I believe we've got maybe another ten
14 minutes. If I could have that time I think I could finish.

15 THE COURT: Well, you'll have plenty -- I'd rather --
16 I'd rather forge ahead right now. You'll have plenty of
17 time to speak with him during the extended lunch break we'll
18 be taking, so if we could get some of these other witnesses
19 out of the way that would be a great help, I think.

20 MR. CLANTON: Well --

21 THE COURT: So let's forge ahead.

22 MR. CLANTON: I'd like to have this --

23 (Counsel conferring briefly.)

24 MR. CLANTON: I would like to have this marked for
25 identification, please.

26 THE COURT: What's --

27 MR. CLANTON: This is a transcript from the Attorney
28 General's Office.

1 THE COURT: It hasn't previously been marked in any
2 other proceedings?

3 MR. CLANTON: No.

4 THE COURT: So that will be Defendant's B for this
5 motion.

6 (Defendant's Exhibit B, a
7 transcript, was marked for
identification.)

8 MR. CLANTON: Your Honor, my next argument involves
9 the testimony of Frederick Clark at Mr. Grizzle's trial.
10 And as I indicated to the Court earlier, that I received a
11 document faxed to my home office last evening from Attorney
12 General James Petzke, a 16 -- excuse me, 12-page document of
13 a transcript of an interview that he had with Mr. Frederick
14 Clark on January 5th, 1999. That is the document, your
15 Honor, that I indicated I provided to my client this
16 morning. He needs to review that. And in fact, I had
17 requested a time to look at the trial transcript with
18 regards to that transcript.

19 If the Court wants me to go ahead I would do that at
20 this time, but I would prior to doing that make that request
21 for some additional time to reconcile those two documents
22 because I received the trial transcript portions relating to
23 that transcript this morning.

24 THE COURT: Well, if you prefer to defer that issue
25 till later in the presentation so you can do that over the
26 break, that would be -- that would be fine with me.

27 MR. CLANTON: Well -- I would call -- I -- I would do
28 that, your Honor. At this time I would call George Mavris

1 that information.

2 The Court gave me the opportunity this morning
3 briefly to interview Mr. Molina. This is information that I
4 think is highly relevant. I think that it's -- it's an
5 obligation on the defense part to request the continuance at
6 this point so that we could in fact investigate further the
7 information provided by Mr. Molina when -- and that
8 information tied to the other information we have and the
9 Court is well aware I think makes it a reasonable request.

10 THE COURT: Well, aside from that have you concluded
11 your presentation on the motion?

12 MR. CLANTON: No, I do have additional information,
13 your Honor.

14 THE COURT: All right, let's defer that issue until
15 we've heard the rest of what you have to offer.

16 MR. CLANTON: Okay.

17 THE COURT: I have about eight or ten minutes before
18 we're going to have to break for lunch because I have
19 another matter I'm going to have to take care of.

20 MR. CLANTON: Lastly, your Honor, it is a matter --
21 the Court is -- has heard extensive commentary on -- for the
22 life of the post-trial portion of this case, certainly at a
23 very pertinent point during the trial itself. The Court
24 will recall and Mr. Fallman called an inmate at Pelican Bay
25 State Prison by the name of Frederick Clark to the stand
26 during the trial. And Mr. Clark proceeded -- well, strike
27 that.

28 Just prior to Mr. Clark taking the stand I was handed

1 a rather large packet of discovery relating to Mr. Clark. I
2 objected at that point and in my brief I think that I have
3 clearly stated my reasons for why a motion for new trial
4 should be granted based on the delivery of that information
5 at the time when Mr. Clark took the stand. So I won't treat
6 that issue at length. I think that the cites I've provided
7 in -- in the brief and the argument and prior argument this
8 court has heard doesn't need to be repeated. However -- and
9 I would rest on -- on those cites and those comments and the
10 brief.

11 However, after Mr. Clark took the stand and continued
12 to testify over the objection of the defense which is
13 treated in this motion, Mr. Clark proceeded to testify about
14 an incident that was not contained in the information I
15 received prior to his sitting down to testify and related to
16 an allegation that Mr. Grizzle was involved in an Aryan
17 Brotherhood plot to injure or -- if not outright murder a
18 young girl, a young girl that is purportedly the daughter of
19 Brian Healy, the star witness for the People.

20 Now, I objected at that time when Mr. Clark began to
21 testify in that area because not only had I not heard that
22 prior to that, he was not contained in any of the discovery
23 that I have. I treat the reasons this -- the cites in my
24 motion as to why that is -- was inappropriate and should
25 ultimately result in a motion for new trial.

26 But what has occurred since I filed this motion is as
27 the Court is well aware, during a phone conference between
28 the Court, Mr. Fallman and myself, I had received

1 information from James Rogers who is an Internal Affairs
2 officer with the California Department of Corrections that
3 in fact a transcript existed of an interview that he
4 conducted with Mr. Clark on January 5th, 1999. Prior to
5 trial. Now, I'd never seen that transcript. I was
6 interested in what was involved in that and in the
7 conversation in chambers Mr. Fallman indicated that he would
8 prevail upon Mr. Rogers to see that I got a copy of that
9 transcript.

10 Mr. James Petzke, the Attorney General's Office was
11 subsequently contacted I suspect by Mr. Rogers, was asked to
12 review that transcript, redact it if necessary and forward
13 it to the defense attorney, myself. I did in fact, your
14 Honor, receive a copy of that transcript at approximately
15 6:00 o'clock last evening. It is a document that is 12
16 pages long and it is in fact an interview which took place
17 between Mr. Rogers and Mr. Clark on January 5th, 1999.

18 And in that transcript, your Honor, which has now
19 been admitted into evidence, I believe it's Defendant
20 Exhibit B at this point --

21 THE COURT: Well, I have held off on a ruling on that
22 because I -- just before this last witness took the stand
23 because I don't know if you want -- if you're wanting me to
24 read this entire thing or if you have some part of it that's
25 relevant that you want to point me to.

26 MR. CLANTON: Well --

27 THE COURT: I mean, what's the point of going through
28 a long rehash if we're only looking at one or two sentences

1 that might --

2 MR. CLANTON: Well --

3 THE COURT: -- be important.

4 MR. CLANTON: The problem of this transcript, your
5 Honor, if I may very -- just very briefly is that there are
6 portions that are relevant to this proceeding that appear
7 haphazardly throughout the -- throughout the transcript.

8 If I may have a copy of the transcript I can focus
9 the Court's on a particular area.

10 THE COURT: All right, maybe the thing to do would be
11 if you were to hit it with a yellow highlighter or something
12 like that because, I mean -- I can imagine myself sitting
13 down and reading -- reading twelve pages to get two, three
14 lines that you might consider are important.

15 MR. CLANTON: That's fine, your Honor. In fact, I --
16 I have highlighted it.

17 THE CLERK: Your Honor, while he's looking through
18 that --

19 (The Court conferring briefly with the clerk.)

20 MR. CLANTON: And I believe counsel has a copy of
21 this at this point.

22 MR. FALLMAN: Yes.

23 MR. CLANTON: Okay. This would be on page eleven,
24 your Honor, at the top of the page.

25 THE COURT: All right, so what you want me to focus
26 on is the two lines there on the top of page eleven that you
27 have underlined?

28 MR. CLANTON: Yes. Yes. I think that is the focus

1 of my comments at this point, your Honor..

2 THE COURT: All right, that Mr. Rogers asks Clark,
3 he's -- Rogers says, "You said that the A.B. were offering
4 \$1,500 dollars for the address of Shannon Nichols."

5 That's -- the whoever -- the transcriber put down the word
6 "phonetically," question mark. And then Clark says, "Yeah,
7 that's" -- "Brian Healy's daughter or stepdaughter or
8 something like that."

9 Okay, that's what you want me to know about?

10 MR. CLANTON: Yes. Yes.

11 THE COURT: All right. Shall we just -- treat --
12 rather than admitting the whole 12 pages, just take it that
13 that was an excerpt of that interview?

14 MR. FALLMAN: That would be good, and if we do that
15 could we also have a court order that all copies be given
16 back, that this be sealed and that the copies that counsel
17 have be returned to S.S.U. Agent Smith, and I'll get my --

18 THE COURT: Rather than sealing it, why keep it in
19 the court file at all where somebody could perhaps get their
20 hands on it? Why don't we just make note that that was an
21 excerpt of the interview, what I just read into the record?

22 MR. FALLMAN: (Nodding.)

23 THE COURT: That way --

24 MR. FALLMAN: Please let's do it the way you're
25 saying.

26 MR. CLANTON: For appellate purposes I would ask that
27 that be sealed. For appellate purposes there are other
28 entries in there that may --

1 THE COURT: Well, why don't you tell me what those
2 are and I'll read those into the record too, because I'm
3 sure the Appellate Court isn't going to be pleased at all to
4 have to wade through a 12-page transcript to see two or
5 three lines and we ought to give them a break, too.

6 MR. CLANTON: I'm sorry, your Honor, it doesn't
7 amount to more than two or three lines.

8 THE COURT: Well, however many it is, tell me the
9 part instead of going through this giant exercise, instead
10 of dumping this in my lap and saying, "Comb through it with
11 a fine-tooth comb."

12 MR. CLANTON: Well, your Honor, for the record I
13 would indicate that may in fact be what has happened to the
14 Court, this was dumped on the Court, but it was dumped on
15 the defense last evening.

16 THE COURT: I'm not faulting you for that. I'm just
17 suggesting perhaps a shortcut so the record will be clean
18 for the Court of Appeals and -- and see if that is --

19 MR. CLANTON: Your Honor, there's a portion on page
20 ten as well, middle portion of the page where there is a
21 discussion of individuals coming to Mr. Clark's cell with a
22 video camera and watching him tear up paperwork.

23 THE COURT: All right. So I'll read that into the
24 record so -- is there more or is that it?

25 MR. CLANTON: There's -- on page seven at the bottom
26 of the page there is an indication that -- further
27 allegations that a former attorney for Mr. Grizzle had in
28 fact sent money to Mr. Clark's sister in payment for Mr.

1 Clark's testimony at trial. And --

2 THE COURT: Are these things conflicted with Clark's
3 testimony?

4 MR. CLANTON: That particular item did not, your
5 Honor; that was part of a -- of a memo. But what's
6 important here, I believe that that information's contained
7 in another memo that we never received and wherein there's
8 additional information. There's reference to a memo here by
9 Mr. Rogers. He's reading off a memo that he -- or a report
10 from somewhere that preexisted this transcript that contains
11 information relating to Mr. Clark and a relationship to Mr.
12 Grizzle that we were never provided with. And --

13 THE COURT: Well, let's do this. I have to -- I have
14 to break now. It's 11:20. As I indicated, I have this
15 other matter that I just can't -- can't get around. I need
16 to take care of it so we're going to break for lunch. What
17 I would suggest is that you -- you underline or highlight or
18 whatever the -- the excerpts from that interview that you
19 want read into the record.

20 I'm just going to assume there won't be any objection
21 by the District Attorney if you're satisfied that this is an
22 accurate transcript of that conversation.

23 MR. FALLMAN: Right.

24 THE COURT: All right, and so -- when we come back
25 from lunch, we'll -- we'll take care of that. I -- there's
26 one other matter that has cropped up so we're going to be
27 reconvening at 1:05. I have something that's going to take
28 about five minutes at 1:00 o'clock.

1 MR. FALLMAN: Your Honor?

2 THE COURT: And we'll be able to take care of it that
3 way.

4 MR. FALLMAN: The only thing I'm worried about is the
5 way this has come -- from -- on the facts, I look at this
6 and I see security things that could cause people to get
7 hurt and that's why I'm asking that the copy that counsel
8 has that Mr. Grizzle has access to be given back and that
9 counsel read in the parts that are not gonna get people
10 hurt. That -- there's no problem with that; we can fashion
11 a remedy. I just don't want the actual -- the physical
12 document, any copies of it with Mr. Grizzle or the Aryan
13 Brotherhood.

14 If you -- if you look at it carefully you'll see the
15 reasons for that. It talks about other crimes and --

16 THE COURT: All right. Well, do not disseminate that
17 to the defendant until we get back from lunch and we'll talk
18 about that further.

19 MR. CLANTON: Well, I would indicate just for the
20 record and to be straight with the Court that I provided a
21 copy to Mr. Grizzle earlier today.

22 THE COURT: Oh, well, cat's out of the bag then.

23 MR. CLANTON: And he did read it in its entirety.

24 MR. FALLMAN: Well, we --

25 THE COURT: So we'll see you at 1:05 this afternoon.

26 MR. CLANTON: Thank you.

27 (Whereupon the noon recess was taken.)

28 MR. CLANTON: Your Honor, may we approach just for a

1 moment? Off the record.

2 (Both counsel at bench for off-the-record discussion.)

3 THE COURT: All right, the People of the State of
4 California versus Elliott Grizzle. We're present in court
5 with both attorneys and the defendant.

6 Mr. Clanton, you may proceed.

7 MR. CLANTON: Yes, your Honor. As I -- I spoke with
8 counsel earlier that I had a witness who became free who has
9 some additional information on an earlier argument regarding
10 the July 26th alleged encounter between Mr. Healy and Mr.
11 Grizzle, and I would call at this time Bob Cloud.

12 ROBERT CLOUD,

13 called as a witness by the defendant, after having been duly
14 sworn to tell the truth, the whole truth and nothing but the
15 truth, was examined and testified as follows:

16 THE CLERK: Be seated and state your name, please.

17 THE WITNESS: Robert Cloud, C-l-o-u-d.

18 DIRECT EXAMINATION

19 Q BY MR. CLANTON: Mr. Cloud, what is your profession?

20 A I'm currently a private investigator.

21 Q And are you often employed by defense attorneys in
22 cases arising out of Pelican Bay State Prison?

23 A Fairly frequently, yes. (Nodding.)

24 Q And in July of 1997 were you so employed in any case?

25 A Yes.

26 Q And were you employed by Paul Gallegos?

27 A Yes.

28 Q And did that case involve a Mr. Healy?

1 MR. CLANTON: I --

2 THE COURT: Anything further?

3 MR. CLANTON: I have nothing further, your Honor.

4 THE COURT: All right, may the witness be excused?

5 MR. CLANTON: Yes, I have nothing further.

6 THE COURT: All right, thank you. You're excused.

7 Your next witness.

8 (Counsel conferring briefly.)

9 MR. FALLMAN: Your Honor, if we may call Judy.

10 THE COURT: Yes, bring your witness.

11 JUDY REYNOLDS,

12 called as a witness by the People, after having been duly
13 sworn to tell the truth, the whole truth and nothing but the
14 truth, was examined and testified as follows:

15 THE CLERK: Have a seat. In the witness box. State
16 your name.

17 THE WITNESS: My name is Judy Reynolds.

18 DIRECT EXAMINATION

19 Q BY MR. FALLMAN: Judy, I mean -- I'm sorry, Mrs.
20 Reynolds.

21 A Uh-huh.

22 Q Would you tell us your title and where you work?

23 A I'm a Legal Clerk III at the District Attorney's
24 Office.

25 Q Okay, how long you work for the D.A.'s Office?

26 A Eleven years.

27 Q All right. And during -- the -- the Grizzle case,
28 was it your duty to log discovery as it was given out to the

1 defense?

2 A Yes, some of the time. At first it was Lorie
3 Wing's -- (Nodding.)

4 Q Oh, okay.

5 A Job.

6 Q Okay, you replaced Lorie Wing at that job?

7 A Yes, she --

8 Q All right, so for part of the Grizzle case at least,
9 you were the official custodian of the records of -- the
10 discovery process for the D.A. to the defense; is that
11 correct?

12 A Correct.

13 Q All right, and as such did you maintain a log to the
14 best of your ability?

15 A (Nodding.)

16 Q Of the discovery that was given to Mr. Clanton or to
17 his investigators in the Grizzle case?

18 A Yes.

19 Q And tell the judge what methods you use to maintain a
20 log of discovery.

21 A When the discovery is submitted to the D.A.'s Office
22 it comes to me and I log it in by computer onto a disk what
23 it is, how many pages, if it's a report or how many videos
24 or cassettes. What that cassettes contains or the video
25 contains, the date of it if I have it, the officer if I have
26 the officer's name and I put the date that I give it to them
27 or into the Clerk's Office. And sign it.

28 Q All right, in this case did you maintain a log of

1 whatever discovery you may have given to Mr. Clanton or to
2 his office or to his investigators concerning an Inmate
3 Clark?

4 A Yes.

5 Q And what, if anything, did you give to Mr. Clanton?

6 A I have a list here of what I did.

7 Q Is that in your computers that you just described?

8 A Yes.

9 Q Okay.

10 A Regarding Clark, "One video. Inmate Clark, E No.
11 73520." There's -- an interview was -- "to Clanton on
12 January 21, '99," by me, and I have in parenthesis, "Handed
13 to him."

14 Q So you -- you marked on there that you hand that --
15 handed that to Mr. Clanton?

16 A Yeah, I show how we submit discovery to the defense
17 attorney.

18 Q Okay.

19 A Either handed or through the Clerk's Office or one of
20 his investigators -- investigators comes in to get it.

21 (Nodding.)

22 Q Okay, and any other discovery that you -- that you
23 were personally responsible for about Mr. Clark?

24 A Frederick Clark? Interview at Pelican Bay State
25 Prison by Smith was to Clanton on January 29th via clerk's
26 receptacle.

27 Q Would that have been paper -- paperwork?

28 A Three pages.

1 Q Okay, and anything else?

2 A Not that I see. That's all I have for Clark.

3 Q Okay. And before the video was there also a -- a
4 short memo that you gave? I think it's listed in your
5 transcript, just one entry above the video?

6 A Oh, I'm sorry, yes, "One memo regarding telephone
7 conversation, Clark, handed to Clanton via D.A.'s Office."

8 Q All right, so two paper memos, one -- one of
9 apparently one page, one of three pages and a video?

10 A Uh-huh.

11 Q And the video was given on January 20th, '99?

12 A The video is to Clanton on January 21st.

13 Q Twenty-first?

14 A Nineteen ninety-nine.

15 MR. FALLMAN: No further questions.

16 CROSS-EXAMINATION

17 Q BY MR. CLANTON: Good afternoon.

18 A Good afternoon.

19 Q I guess my first question would be do you have
20 personal recollection of actual transfer of that tape to my
21 person?

22 A Huh-uh. (Shaking head.) No.

23 Q Okay. And is it policy to perhaps receive the
24 discovery and have made the log prior to having delivered
25 the -- the discovery on occasion?

26 A If, for instance, the handed one, if -- if you called
27 me and said, "I'm going to be in there to pick it up," I
28 would have done it that way. (Nodding.) But I can't tell

1 you that.

2 Q Well --

3 A That that's how it happened.

4 Q Okay.

5 A I could have logged it in after I handed it to you.

6 Q Okay.

7 A I just can't recall.

8 Q Or it could have been logged in prior to?

9 A It could have. (Nodding.)

10 Q And is it possible -- as -- as I suspect you're
11 aware, that I have respect for your professionalism and your
12 courtesy --

13 A Thank you.

14 Q -- in the District Attorney's Office here, but is it
15 possible that this entry could have been made and a mistake
16 had been made? In fact, I did not receive that tape? Is
17 that a possibility?

18 A That's possible but I don't think so.

19 Q Okay, but you don't have any memory of --

20 A I don't know.

21 Q -- actually -- delivering it to --

22 A There are lots of videos and other tapes that I do.

23 MR. CLANTON: Okay, nothing further, your Honor.

24 MR. FALLMAN: No questions.

25 THE COURT: You may step down. Thank you.

26 Next witness.

27 MR. CLANTON: I would call Dan Smith to the stand,
28 your Honor.

1 DANIEL L. SMITH,

2 called as a witness by the defendant, after having been duly
3 sworn to tell the truth, the whole truth and nothing but the
4 truth, was examined and testified as follows:

5 THE CLERK: Would you state your name, please?

6 THE WITNESS: Daniel, middle initial L., Smith.

7 DIRECT EXAMINATION

8 Q BY MR. CLANTON: Good afternoon. Agent Smith is it?

9 A Yes, sir.

10 Q Okay. Agent Smith, I wanted to ask you a few
11 questions regarding Vernon Rubidoux. Specifically what is
12 your capacity with C.D.C. currently?

13 A I'm a special agent in the Special Service Unit,
14 Department of Corrections.

15 Q And how long have you occupied that position?

16 A Since November of 1988.

17 Q Okay. And from 1988 to the present, did you ever
18 come into contact with Vernon Rubidoux, an inmate in the
19 California Department of Corrections?

20 A I think the only time that I remember contact with
21 Inmate Rubidoux was during the Inmate Grizzle trial.

22 Q Okay. Do you recall the date of your first contact
23 with Mr. Rubidoux?

24 A No, I don't.

25 Q Do you recall the nature of your contact with Mr.
26 Rubidoux?

27 A I think it might have been in -- accompanying Deputy
28 District Attorney Jim Fallman into one of the holding areas

1 to interview Mr. Rubidoux, I'm not sure. When I had my
2 first contact or any, I never made any records or notes
3 regarding that.

4 Q Okay. Did you ever discuss Mr. Rubidoux with other
5 agencies within Department of Corrections?

6 A I'm not sure what you mean in terms of "other
7 agencies."

8 Q Did you ever -- I'm sorry. Did you ever discuss Mr.
9 Rubidoux with Captain Dillard of Pelican Bay State Prison,
10 the gang coordinator?

11 A I don't think so.

12 Q Did you ever discuss Mr. Rubidoux with Sergeant
13 McKinney?

14 A I think more than -- more than likely Sergeant
15 McKinney might have brought him up in terms of conversation
16 to me.

17 Q And do you recall what that conversation was about?

18 A Other than I think that Rubidoux was a witness, as he
19 was the main investigator for the case for Mr. Fallman.

20 Q Did he ever discuss Mr. Rubidoux as an informant?

21 A You know, he may have but I'm not sure.

22 Q Specifically, Agent Smith, was Mr. Rubidoux ever
23 known to you as an informant who was going to be used as
24 a -- information-gathering plan in the Littrell and/or
25 Grizzle case?

26 A Not in -- not in that framework.

27 Q Did you ever discuss with anybody any plan that
28 anybody may have had to do that?

1 A No, sir. I don't recall anything like that and my
2 only recollection of Rubidoux was that he was going to be a
3 witness for the Prosecution in the Grizzle case.

4 Q And how did you learn that?

5 A Working on the Grizzle case with Sergeant McKinney
6 and Mr. Fallman.

7 Q And did Sergeant McKinney relate to you how Mr.
8 Rubidoux became part of all that?

9 A I think somewhere during the course of his
10 investigation Sergeant McKinney came upon Mr. Rubidoux and
11 developed some information from him.

12 Q Do you know what date that was?

13 A No, sir.

14 Q And you know what information that was initially?

15 A No. I don't have any direct recollection of what his
16 information was as -- Mr. Rubidoux had no interest to me in
17 terms of I had other people that I was dealing with that
18 were more important to me than Mr. Rubidoux.

19 Q Do you know the first contact of any investigation
20 you had with Mr. Rubidoux with regard to these cases?

21 A I don't have any recollection of any specific dates
22 of contact by anybody in terms of investigation by this
23 department to Rubidoux.

24 Q Well, since the time of the conclusion of the Grizzle
25 trial, have you discussed with Sergeant McKinney or any
26 other individuals Mr. Rubidoux's role in that case?

27 A I've had discussions with the District Attorney
28 regarding Mr. Rubidoux since the conclusion of the trial.

1 Q And in what regard?

2 A I think it was more of transporting Mr. Rubidoux back
3 to wherever it was he was brought up from. I think he was
4 brought up and returned to the Substance Abuse Treatment
5 Facility at Corcoran. For the testimony he gave in the
6 Grizzle trial, and then when he was finished we transported
7 him back down there, being our department transported him
8 back to S.A.T.F.

9 Q Do you know, Agent Smith, who or what agency would be
10 responsible for coordinating the use of informants at
11 Pelican State Prison?

12 A I don't know if there's any one agency specifically
13 charged with that duty.

14 Q Well, let me ask a more pointed question. Is there a
15 unwritten position or unwritten plan for the use of
16 informants at Pelican Bay State Prison?

17 A I have no knowledge of anything like that.

18 Q So your testimony is here today you have no knowledge
19 of Mr. Rubidoux being selected as an informant particularly
20 for the Grizzle case or the Littrell case?

21 A Selected in terms of --

22 Q In terms of any particular plan to be put into force
23 to use him as an informant.

24 A No, sir, I've -- that's -- I don't have any
25 recollection of anything like that.

26 Q Well, let me change gears here, Agent Smith. From
27 January 5th to February 19th of this year, did you ever
28 learn of any claims by an inmate by the name of Frederick

1 Clark to -- or regarding an alleged assault or plan of an
2 assault on a child of Mr. Healy's?

3 A I'm not sure of the exact dates and it may be within
4 that time frame you're quoting but I'm not sure at all.
5 When I was made aware of Inmate Clark was I think through a
6 short memorandum that came from -- an Internal Affairs
7 investigator, Jim Rogers, behind an investigation he had
8 done wherein he had interviewed Inmate Clark and there was
9 just a very brief disclosure of information that Clark had
10 some information regarding the case. And subsequently
11 myself and District Attorney Fallman here interviewed Inmate
12 Clark.

13 Q And were you ever made aware, Agent Smith, of the
14 existence of a transcript of the meeting on January 5th
15 between Mr. Clark and Jim Rogers?

16 A I was unaware of that transcript until I saw it just
17 this morning on the table here in this room. I didn't know
18 there was a transcription of that.

19 Q Well, you saw -- you saw a memo from Jim Rogers dated
20 January 13th that indicated Mr. Clark had given information
21 to Mr. Rogers regarding gang activity; isn't that correct?

22 A I would -- I would have to say yes. I'm not sure of
23 the memo or the date of it, yeah, that he had given some
24 information to Agent Rogers.

25 Q Okay. Now, it would be in your job description to
26 follow up on that; wouldn't it?

27 A We did interview Inmate Clark.

28 Q Okay. And as a result of your receipt of that memo,

1 that January 13 memo from Mr. Rogers, did you ever contact
2 Mr. Rogers?

3 A Yes, I did.

4 Q And did he tell you about that transcript he had?

5 A No, he said he didn't have a transcript at all at the
6 time. What he had was an ongoing Internal Affairs
7 investigation that was not closed and therefore the
8 particulars of the information in that investigation other
9 than the specific information he released we weren't gonna
10 have access to.

11 Q Well, on January 13th you were assisting Mr. Fallman
12 in preparing the Grizzle case for trial; weren't you?

13 A I believe so.

14 Q And Mr. Rogers knew that; isn't that correct?

15 A He may have.

16 MR. FALLMAN: Objection, that calls for speculation
17 about what Rogers may or may not have known.

18 THE COURT: Well, if you know you may answer.

19 THE WITNESS: I -- I would only guess that he knew
20 that we were doing something with the case.

21 Q BY MR. CLANTON: Well, you --

22 A Yes.

23 Q I'm sorry. You've read that transcript; haven't you?

24 A Yeah, I breezed through it I think once or twice.

25 Q And there is on page eleven of that transcript near
26 the top of the page an exchange between Mr. Rogers and Mr.
27 Clark wherein Mr. Clark confirms at least his allegation of
28 an alleged payment of \$1500 for information regarding Mr.

1 Healy's daughter; isn't that correct?

2 A I'm not sure -- if you don't have two objectives in
3 that thing. He confirms that a payment was made or that
4 there was discussion of a payment?

5 Q Just confirms that he had that knowledge or -- or
6 created that knowledge or -- or mentioned that fact. Mr. --

7 A You're talking --

8 Q That allegation.

9 MR. FALLMAN: Your Honor, that transcript I guess
10 speaks for itself. It's speculative to ask him about it.
11 He wasn't there.

12 THE COURT: Well -- maybe it's quicker than reading
13 the whole transcript if he just asks one question about it.

14 Do you -- do you know the answer or --

15 THE WITNESS: I'd like to look at the transcript,
16 your Honor, if I could.

17 THE COURT: All right.

18 MR. CLANTON: If I may approach, your Honor.

19 THE COURT: All right.

20 MR. CLANTON: This is --

21 THE COURT: What are we trying to prove, anyway?
22 That -- that Rogers did or did not know about the -- this
23 case or what -- what's -- where are we going with this?

24 MR. CLANTON: Well, your Honor, in my brief one of my
25 principal arguments --

26 THE COURT: Uh-huh.

27 MR. CLANTON: -- proposing that new trial is
28 appropriate --

1 THE COURT: Uh-huh.

2 MR. CLANTON: -- under the circumstances is that in
3 fact prior to trial that the District Attorney and/or
4 agencies under his employ had information that in fact Mr.
5 Clark had made these allegations. Now, those allegations,
6 I --

7 THE COURT: Well, I think -- I think what you're
8 saying is that Rogers knew about this case and therefore is
9 charged with knowing about the discovery demand; he had this
10 information and therefore should have handed it over. I
11 mean, is that where we're going with it in a nutshell?

12 MR. CLANTON: That Rogers had the information as of
13 January 5th.

14 THE COURT: Yeah.

15 MR. CLANTON: He is in -- Mr. -- Rogers knows that
16 Agent Smith and Mr. Fallman are preparing a trial --

17 THE COURT: Uh-huh.

18 MR. CLANTON: -- against Mr. Grizzle.

19 THE COURT: Uh-huh.

20 MR. CLANTON: That in fact this transcript existed;
21 that in fact Agent Smith would have received that
22 information or other operatives of Mr. Fallman; Mr. Fallman
23 had that information; and if the Court will recall at trial
24 when Mr. Clark sat down and he began to testify about this
25 alleged plan to -- as he --

26 THE COURT: Yeah.

27 MR. CLANTON: -- indicated, murder --

28 THE COURT: But how does -- how does the question did

1 Rogers know help you move the ball closer to the goal line?

2 MR. CLANTON: Then in fact if he knew that they were
3 preparing that trial?

4 THE COURT: Yes. Then what?

5 MR. CLANTON: If in fact he would have assisted and
6 given that information that he had available, that would
7 have been very relevant, very material from their
8 perspective from a --

9 THE COURT: Maybe. Why don't you just ask him did he
10 give that information to him.

11 Q BY MR. CLANTON: Well -- did you receive that
12 information from him?

13 A What I received was in essence that little one-page
14 memo. And then I asked him, well -- I called Mr. -- Agent
15 Rogers, I asked him about the information and there was --
16 concerning his interview of Inmate Clark relative to the
17 information regarding the Grizzle case.

18 Q And did he discuss with you Mr. Clark's comment that
19 you've read in this transcript about an alleged attempt on
20 the life of Mr. Healy's daughter?

21 A I don't know if that came up at all during our
22 conversation and -- you know, I think the first we heard of
23 it was when we interviewed Clark ourselves.

24 Q So do you recall the date of that interview?

25 A Not off the top of my head, no, sir.

26 Q Was it before trial?

27 A -- I don't know what date your trial actually
28 started and I don't know the date that I interviewed Inmate

1 Clark.

2 Q Well, so -- your testimony is that you first learned
3 about this comment of Clark at your -- at the time of the
4 interview of Mr. Clark?

5 A I think so. But I'm not positive.

6 MR. FALLMAN: Your Honor?

7 THE WITNESS: I --

8 MR. FALLMAN: I'm not trying to -- this is not an
9 objection. I'll stop if you want but I think we can solve
10 the problem. There was an interview. It was in January.
11 It's the one referred to by Judy Reynolds in her log. The
12 date of the interview will be said at the front of the tape.
13 It's the only interview and it will answer all of counsel's
14 questions.

15 MR. CLANTON: I will -- with regards to the tape,
16 your Honor, I will under penalty of perjury declare on the
17 record that I never received a copy of this tape.

18 THE COURT: Well -- if the clerk logged it out to
19 you, you say you didn't get it, I -- I don't know. What --
20 what are you -- what are you attempting to prove? That
21 they --

22 MR. CLANTON: They --

23 THE COURT: -- falsified a log --

24 MR. CLANTON: No.

25 THE COURT: -- and said she gave it to you and didn't
26 or --

27 MR. CLANTON: No.

28 THE COURT: -- she gave it to you but it got lost in

1 some other things that were given to you? What?

2 MR. CLANTON: No.

3 THE COURT: Where are we going with this?

4 MR. CLANTON: With regards to the receipt or lack of
5 receipt of this tape, I will simply state to the Court I was
6 never handed the tape, it was never handed to me by a clerk,
7 and I suspect -- knowing this particular clerk, that she is
8 very responsible, I suspect it is a clerical error. That
9 that log -- if she had the tape that she made the log. It
10 was never transferred to me. I in fact never received it.

11 THE COURT: Well, here's the thing on this discovery
12 piece of it, and maybe -- I don't know, I'm very reluctant
13 to say anything. I'm more inclined to just sit back and say
14 nothing and -- let it all go by then just make a ruling, but
15 maybe in the interests of shortening this thing down, it
16 strikes me that the discovery piece of this problem,
17 whether -- whether there was a failure to make discovery or
18 not is of no consequence anymore unless you can show that
19 she -- had you had the discovery you could have specifically
20 done some -- not just, "It would be nice to have it, I would
21 have liked to have had it to cross-examine," but that if you
22 had cross-examined with the benefit of this that something
23 big would have turned up and show me what that is.

24 I mean, you've had the stuff now for a long time
25 so -- by now you've had as much time as you would have had
26 if you'd had it before trial in the first place, and if
27 something big wasn't going to turn up, just the fact that
28 you didn't have it for cross-examination is kind of no harm,

1 no foul, so what. What is -- what is the smoking pistol
2 that we -- that you now know was going to turn up if you'd
3 been able to cross-examine Clark with this stuff?

4 MR. CLANTON: Well, first, your Honor, our position
5 is -- as we stated in our brief is that there was a 1054
6 violation at the time Mr. Clark's --

7 THE COURT: But that doesn't matter unless it some in
8 some fashion prejudices you.

9 MR. CLANTON: Well --

10 THE COURT: So I'm asking you now what is the
11 prejudice.

12 MR. CLANTON: Well, first we were not able to
13 properly impeach Mr. Clark.

14 THE COURT: Okay, now you've had the time to have dug
15 out everything you would have dug out, what would you have
16 impeached him with?

17 MR. CLANTON: Well, your Honor, what I would have
18 impeached him with is the fact that was there -- first of
19 all, I still don't know this date whether this fact Mr.
20 Healy has a daughter and that was -- foisted on us literally
21 at trial.

22 THE COURT: Okay, but you've had all -- you've had
23 plenty of time, you've had months now to find out, so if you
24 haven't found out by now it wouldn't have mattered if they
25 had made this discovery six months before trial because six
26 months have gone by and you still haven't found out so I
27 don't count that.

28 MR. CLANTON: Okay. Whether in fact there ever had

1 been this contact that Mr. Clark claimed.. We were able to
2 show that in fact that information that he proposed to --
3 that there was a plan to eliminate Mr. Healy's daughter, if
4 we were able to show -- had that information, were able to
5 do the proper investigation to show that he was never in a
6 position, one, to even get that information.

7 THE COURT: Okay, but here's my point. You've now --
8 I mean, ever since the trial, which was what, six months
9 ago?

10 MR. CLANTON: February.

11 THE COURT: You've known about Clark's allegation
12 they're out to get Healy's daughter so you've had plenty of
13 time to investigate that. Now, if you have turned something
14 up that you didn't have at trial that you would have turned
15 up and had at trial to blast him with on the witness stand
16 then maybe you're getting somewhere. But if you've had all
17 this time, you still haven't turned this up, then I now know
18 that having had that information wouldn't have helped you.

19 So which it is? Do you have the -- do you have the
20 big clue that would have -- that would have shot Clark out
21 of the saddle or not? Because if you don't this is just a
22 wasted exercise.

23 MR. CLANTON: Well, your Honor, I think it's -- it's
24 important to note that we were not aware of all of the
25 relationships that Mr. Clark had at the time that created
26 those -- those relationships.

27 THE COURT: Okay, but now you've got all that stuff,
28 I mean, where's the -- where's the smoking gun that you

1 would have been able to confront Clark with? If it's not
2 there, it doesn't make any difference. That -- that maybe
3 they dropped the ball and didn't give you the discovery they
4 should have given, I don't know, I'm not deciding that, but
5 I am saying that even if it were true it wouldn't have
6 helped you. So -- so you got to show me what you would have
7 done with this information that would have won the case for
8 you.

9 MR. CLANTON: Well, I think, your Honor, that if we
10 would have had that information we would have been able to
11 provide an argument to the Court that -- or to provide
12 testimony that would in fact undercut Mr. Clark's
13 assertions.

14 THE COURT: That's what I'm asking you to tell me.
15 What testimony?

16 MR. CLANTON: Well --

17 THE COURT: What testimony have you now been able to
18 turn up had -- that you would have been able to present at
19 trial if you'd had this information sooner? What testimony?

20 MR. CLANTON: Well, part of the problem, your Honor,
21 is that -- the very transcript that contains the information
22 that we would have needed to pursue, that we got last night
23 at 6:10 p.m. because that's when I received the
24 transcript --

25 THE COURT: Uh-huh.

26 MR. CLANTON: -- of Mr. Rogers' interview which
27 contains the information that tells us exactly what was
28 transpiring with Mr. Clark. And -- and as this court will

1 recall, there were numerous occasions when we were here
2 arguing to try and get that very same information. And also
3 I have a copy of the trial transcript at page --

4 THE COURT: All right. Well, you've had a chance to
5 look at that over lunchtime. I mean -- now -- I mean,
6 where's -- where's the hot trail that we're onto now, now
7 you've seen it, now you've had time to read it? I mean, it
8 sounds to me --

9 MR. CLANTON: Could I have just a moment?

10 THE COURT: -- like we're just -- we're just playing
11 this kind of -- this game of gotcha. "You dropped the ball
12 on discovery," but that doesn't matter. Sure, you've --
13 maybe you -- maybe you've got them, they don't make -- maybe
14 they didn't give you some discovery they should have, but if
15 we go back and find out that if you had had it in the first
16 place it wouldn't have helped you, I don't care and I'm not
17 going to grant you a new trial on account of that.

18 MR. CLANTON: Okay.

19 THE COURT: Unless you can show me what you were
20 going to do with that information that would have changed
21 the outcome of this trial.

22 MR. CLANTON: Well, your Honor, I think that one of
23 the principal areas that we would have been able to explore
24 is that we would have been able to show that in fact Mr.
25 Clark had perjured himself. If we'd had that information
26 that he was engaging in a perjurious act, that in fact we've
27 learned that Agent -- excuse me, that Mr. Rogers had in fact
28 requested of Mr. Fallman and the Attorney General's Office

1 represented here by Mr. Petzke that he be charged with
2 perjury and we learned that after trial. And had we had
3 that information I would have been able to put Mr. Rogers up
4 here, I would have been able to ask Mr. Fallman himself
5 about that, I would have been able to call Mr. Petzke and
6 asked him whether in fact they had been -- whether Mr.
7 Rogers had in fact asked them to charge Mr. Clark with
8 perjury.

9 Now, Mr. Clark -- excuse me, Mr. Rogers in his latest
10 memo after the last discovery hearing that we had in this
11 court put at the foot of that that he had asked both Mr.
12 Fallman and Mr. Petzke to charge Mr. Clark with perjury and
13 they declined to do that. Now, if we had had that
14 information at the time of trial it would have been
15 extremely helpful. I think that a jury hearing that an
16 operative, a high ranking official in -- in C.D.C. had asked
17 both of the agencies that are promoting this testimony to
18 charge him with perjury, I think that would have had a
19 significant impact on this jury.

20 THE COURT: But -- Clark doesn't have to be charged
21 with perjury. He admitted right out in front of the jury
22 that he committed perjury. He testified that he had
23 committed perjury, remember, and confessed to it so --

24 MR. CLANTON: That's true with other matters, but
25 what happened with all of these informants, your Honor, and
26 I appreciate --

27 THE COURT: Okay, I don't want to take up more time.
28 What I'm going to do is I've kind of shot my bolt, I think,

1 you know, what might help you and what is wasting your time
2 so I'm going to -- I'm going to shut up and let you go
3 ahead.

4 MR. CLANTON: Well, I appreciate the Court's candor,
5 your Honor. I just -- I believe that the Court's position
6 for some time has been that all of the informants in this
7 case were admitted perjurors for the most part and were
8 effectively impeached, but I would respectfully disagree
9 with the Court because of the result in this trial and the
10 lack of physical evidence that would support -- that would
11 support --

12 THE COURT: All right.

13 MR. CLANTON: -- their testimony. Now --

14 THE COURT: I think I get it -- get -- I get it.
15 Let's go ahead with the witness.

16 Q BY MR. CLANTON: So you first became aware of that
17 information at the time of your interview with Mr. Clark?

18 A To the best of my recollection. (Nodding.) Yes.

19 Q And did you -- and Mr. Fallman was present at that
20 time; isn't that correct?

21 A Yes, sir.

22 Q And in fact, Mr. Rogers at some time told you that he
23 had severe doubts about Mr. Clark's credibility; didn't he?

24 A I think so but he said his investigation was still
25 ongoing.

26 Q Did he ever tell you that he had asked Mr. Fallman to
27 charge Mr. Clark with perjury?

28 A I don't think he said that. I don't think he ever --

1 because -- he hadn't closed his investigation yet.

2 Q Are you aware at any time from the beginning of the
3 trial of Mr. Grizzle to date that Mr. Rogers had asked both
4 the Attorney General's Office and Mr. Fallman to charge him
5 with perjury?

6 A I don't think he ever said anything about charging
7 Clark with perjury. I think he may have said something to
8 me he thought -- at times he didn't believe Clark was
9 truthful. So I don't know where the nexus is charging him
10 with perjury.

11 Q You've seen the latest declaration from Mr. Rogers;
12 did you not? Mr. Fallman shared that with you?

13 A No. I don't think I read it.

14 MR. CLANTON: I have nothing further, your Honor.

15 MR. FALLMAN: Your Honor, no questions.

16 THE COURT: All right, you may step down.

17 Next witness.

18 (Counsel conferring with the defendant.)

19 MR. CLANTON: Your Honor, that would conclude my
20 arguments. I do have concluding remarks but that would be
21 the end of my argument.

22 THE COURT: All right. Mr. Fallman?

23 MR. FALLMAN: I have one witness, very brief.

24 THE COURT: All right.

25 MR. FALLMAN: Officer Cruse. Step up, raise your
26 right hand.

27 THE CLERK: Would you raise your right hand, please?

28 / / /

1 I'm going to deny the motion for continuance. It appears
2 that if there were anything it would simply be cumulative of
3 Mr. Molina and we don't know really that there would be --
4 from this individual apparently known as No Brain, that
5 there -- that there's nothing -- there's no indication that
6 there's a need to delay this matter further while we --
7 while we try to track that person down who apparently was
8 receiving virtually the same communications that Mr. Molina
9 was hearing. And so there's nothing to indicate that he
10 could offer anything new so that motion is denied.

11 Then as to the issue of the motion itself for new
12 trial, does either party have anything further -- well,
13 first of all, any further evidence to add on that? On
14 that -- that issue?

15 MR. CLANTON: No further evidence, your Honor.

16 THE COURT: Mr. Fallman.

17 MR. FALLMAN: Your Honor, I'm not going -- well, I'm
18 wondering if I should -- I have a tape. The offer of proof
19 would be that counsel -- we've heard from the secretary
20 about the procedure about whether he received it or not.
21 This tape clearly shows that the evidence was given to him
22 about Clark and -- and Clark's statements about Healy's
23 daughter, and I think if you recall the bench conference the
24 focus there was not that testimony. It was the new
25 document. The thing he was arguing about was new
26 evidence -- at the time of trial was the documentary
27 evidence signed by Healy that the guy back in the cell said
28 if we went out to his cell we'd find a letter from Healy in

1 the cell. That was the surprise stuff, not the Healy
2 daughter thing that was on the tape, and he's had that since
3 January of -- but it -- just so that's not a loose end,
4 seriously, if he seriously contests that maybe I ought to
5 put this tape into evidence.

6 THE COURT: Well -- I guess to what purpose.
7 There's -- there's no dispute I don't think from either one
8 of you about what's on the tape. The only question is
9 whether -- did he get it, right?

10 MR. FALLMAN: Well, that -- but --

11 THE COURT: So there's no point --

12 MR. FALLMAN: But the bottom line is this tape, if
13 the Court --

14 THE COURT: Well, I mean, you're talking about
15 stopping this hearing, getting the tape player out,
16 playing -- how long is this tape?

17 MR. SMITH: Just a half hour.

18 THE COURT: For me to watch this tape.

19 MR. FALLMAN: Probably -- probably 45 minutes to an
20 hour.

21 THE COURT: Forty-five minutes long to find out
22 what's on it when you both agree what's on it, you've both
23 seen it, and I don't think you're arguing about what's on
24 it, right?

25 MR. CLANTON: I have never seen this tape, your
26 Honor.

27 THE COURT: Never seen it.

28 MR. CLANTON: Your Honor, I'm not asking you to view

1 this tape. I would take Mr. Fallman's representation about
2 what's on this tape. I've never -- I've never seen it. I
3 would -- I would take issue with the fact that at the time
4 of the trial, the bench conference, that my only objection
5 was to the new evidence that was -- that was given to me at
6 the time that Mr. Clark's identified.

7 THE COURT: Well, wait a minute. When did your claim
8 first come up that this tape was in existence but you'd
9 never seen it and from then why haven't you gotten to see it
10 if he's got the thing right there in his hand?

11 MR. CLANTON: Well, I learned of this tape, your
12 Honor, at the time of the filing of Mr. Fallman's motion and
13 saw the letter from the --

14 THE COURT: When was that?

15 MR. CLANTON: -- evidence clerk. What I --

16 THE COURT: How long ago was that? Weeks?

17 MR. CLANTON: It was late last week when I received
18 his opposition.

19 THE COURT: Have you done anything to try to get it
20 from him and take a look at the thing?

21 MR. CLANTON: Well, frankly, no, your Honor. I would
22 take his representation.

23 THE COURT: All right, all right.

24 MR. CLANTON: But I did interview Diana Willis with
25 regards to it and I would just note, your Honor, that on
26 page 77 of the trial transcript, lines 15 through 28, one of
27 the -- one of the problems that I was trying to convince the
28 Court that was the basis for my request for -- for either a

1 continuance at the time of Mr. Clark's appearance on the
2 stand or sanctions or whatever or something from the Court
3 in order for us to address the new issues is immediately
4 after Mr. Clark uttered these words that in fact there was
5 this --

6 THE COURT: Uh-huh.

7 MR. CLANTON: -- agency's allegation that there was
8 an attempt on Mr. Healy's daughter. In other words, I
9 made -- I made it clear on the record that I had knew
10 nothing about that. In fact, my recollection, Mr. Fallman
11 himself indicated that that was something that was new to
12 him, but on that page of that transcript, I make it very
13 clear that I have not heard that before and that we were put
14 in a scrambling position to come up and try and -- and --
15 and deal with what I considered a major problem that had
16 surfaced.

17 THE COURT: All right.

18 MR. CLANTON: So the idea that I knew about that --
19 that transcript is -- is --

20 THE COURT: Well, if you're both agreed -- whether
21 you've seen it or not, you're both agreed what's on that
22 tape, tell me what's on it that would be relevant rather
23 than sit here for 45 minutes and watch it.

24 MR. FALLMAN: What's on it is the same as this
25 transcript that came in from the Attorney General; that
26 basically that he -- that Clark was alleging that the --
27 these A.B.'s were paying -- paying him money to get the name
28 of -- of the daughter of -- of Healy. And trying -- I mean,

1 to try to get her -- not her name but her location.

2 THE COURT: All right, and you agree that's what's on
3 the tape?

4 MR. CLANTON: That's what Officer Willis has
5 indicated is on the tape. I would accept counsel's
6 representation --

7 THE COURT: All right.

8 MR. CLANTON: -- and Officer Willis's.

9 THE COURT: We'll just treat that as an agreed fact
10 then so we don't have to spend 45 minutes looking at the
11 thing.

12 MR. FALLMAN: Okay.

13 THE COURT: All right, so then -- if -- if we -- if
14 we bypass that problem then, Mr. Fallman, you -- you can --

15 MR. FALLMAN: I have no further evidence, just a
16 little bit of argument or --

17 THE COURT: All right. Well, since it's -- the
18 moving party, we'll go back to the moving party first for --
19 for final summation.

20 MR. CLANTON: Your Honor, the position of defense
21 with regards to this case is fairly clear. I -- I have
22 argued this many times before this court that there is no
23 physical evidence to implicate my client in this case. The
24 People relied upon informants. What we have attempted to
25 do, did our best before trial to try to get the information
26 that was necessary in order to properly defend Mr. Grizzle.
27 We were frustrated on many levels and I think that events at
28 trial were such that they were tied to our -- our

1 Mr. Mavris isn't there at 10:00 o'clock but Mr.
2 Rubidoux is kept there. That -- I think speaks volumes.
3 And that's a takeoff point for all of this.

4 I think that the Court should look at this and be
5 able to determine that in fact there was a Messiah
6 violation. I think that it's clear that Mr. Rubidoux put
7 himself in the position of acquiring this information, put
8 himself or with the aid of -- and with the aid of C.D.C. put
9 himself in contact with Mr. Littrell and Mr. Grizzle. That
10 was done deliberately. And the fact of -- what proves that
11 is that Mr. Mavris was never there in the morning, didn't
12 make that appointment, but Mr. Rubidoux is. So who put him
13 there? Mr. Rubidoux cannot call up and ask to be taken to
14 attorney visiting. He's taken there by officers. And now
15 he can tell the story.

16 So I think the Court has everything that it needs in
17 order to make the determination that a Messiah violation
18 took place.

19 Lastly, your Honor, the business with Mr. Clark.
20 When Mr. Clark came and testified here on the -- at the
21 moment he sat down I was handed a packet of material. I
22 requested that the Court provide me just a continuance so I
23 could review that. The Court denied that. I asked for the
24 sanctions under 1054 which I felt were appropriate. The
25 Court denied that. The direct examination took place and
26 the damage is done. Because I could not cross-examine Mr.
27 Clark whatsoever on any of those issues that he brought up.

28 As -- as I was cross -- as I was reading these

1 documents I'm cross-examining him and a lot of that had to
2 do with his request for out-of-state parole. And his entire
3 bargain with the District Attorney. I was put in a position
4 to scramble under those circumstances and I think that was
5 very unfair to Mr. Grizzle. I was not able to do what I
6 would call an effective cross-examination because I'm
7 literally reading and cross-examining at the same time. I
8 think that if we would have had an opportunity for a break
9 in proceedings to review those materials I would have done a
10 better job of cross-examining Mr. Clark and ultimately the
11 result would have been different.

12 Additionally, your Honor, what came up aside from
13 just -- the information that I'd just received from Mr.
14 Fallman was this allegation that my client somehow was
15 involved in a plot to kill Mr. Healy's daughter. Now, I
16 understand from the Court's earlier discussions about its
17 view of the import of that exchange or that portion of our
18 argument with regards to a new trial. However, my point is,
19 your Honor, and I -- and as I represented to the Court
20 earlier, I did not receive that tape. I can state that for
21 the record. Never did receive that and the record of the
22 trial transcript supports that because what I am doing at
23 the bench is telling the Court this is information that's
24 not even contained in this that I have. I have never heard
25 that and that's what the trial transcript says. And I asked
26 for the opportunity to look into that matter in order for me
27 to try and undo some of the damage that Mr. Clark in my mind
28 had just done to my client.

1 I felt that it was a -- a blow amid ships right then
2 and there. I had absolutely no way of countering that
3 testimony. I think it was very damaging testimony when you
4 have somebody who's talking about a child murder and that
5 relates back, your Honor, to some of my other arguments in
6 this case which were that the Court allowed Mr. Fallman to
7 get into a lot of other areas about the Aryan Brotherhood
8 that implicated my client in other uncharged crimes.

9 And I think the case law which I'm not going to
10 recite now, it's all in my brief and so I -- on the record
11 want to make sure that my arguments are tied to the case law
12 which I've cited there, I think the Court erred at that
13 point by allowing Mr. Fallman basically to provide a seminar
14 on the Aryan Brotherhood and implicate my client in any
15 number of events and associations that he was never able to
16 sustain by any testimony by any member of California
17 Department of Corrections. It was all hyperbole offered
18 through informants that I was not for the most part able to
19 sufficiently cross-examine because of the lack of
20 information that was discovered to us.

21 And I think when you look at this trial as a whole
22 collectively there are a number of very clear problems that
23 in and of themselves are sufficient for a grant of motion
24 for new trial but I think that the Court, and I would hope
25 that the Court would have a sense that there was perhaps too
26 much enthusiasm on behalf of the Department of Corrections
27 to sustain a conviction in Mr. Grizzle's case. And that in
28 fact corners were cut. Corners were cut that we've

1 the other things of the Polly Klaas case were kept -- that
2 could have been prejudicial came up.

3 Molina turns out to have not done -- I think what the
4 defense was trying to show. They -- the offer of proof was
5 that he was gonna prove that Rubidoux lied at Corcoran or
6 Delano, wherever it was, and his statement was, number one,
7 "I don't like Rubidoux because I'm Hispanic and he was
8 making fun of my Cinco de Mayo cell breaks." Number two, "I
9 didn't say that I heard him lie." So -- I think that fails,
10 the argument as to him.

11 There's -- one other thing I wanted to mention,
12 trouble is I can't remember -- oh. I think the evidence at
13 trial, the things in evidence were -- were overwhelming
14 evidence of guilt with -- with plenty of potential
15 impeachment to which the -- the showings here would just be
16 cumulative, wouldn't change anything. I think that the
17 motion for new trial should be denied.

18 (Mr. Fallman conferring with Mr. Smith.)

19 MR. FALLMAN: I think I'll stop there, your Honor.

20 THE COURT: All right, we'll recess ten minutes then
21 I'll hear the last argument by the defendant. Ten minutes.

22 (A brief recess was taken.)

23 THE COURT: We have both attorneys and the defendant
24 present.

25 Your rebuttal argument, Mr. Clanton?

26 MR. CLANTON: I'm going to be brief, your Honor. I
27 think that all the issues for the most part have had a --
28 have been aired today. I would just point out that one of

1 the most troubling aspects for me in this case in the way we
2 put our motion for new trial today together is the issue of
3 Mr. Clark, and I still have a few remaining comments there.
4 I think that the Court has a particular perspective on that
5 that's very clear and I appreciate the candor of the Court
6 earlier today, but I must -- on behalf of Mr. Grizzle make
7 some statements with regards to that issue.

8 And that is we persisted for some time in attempting
9 to get the information relevant to Mr. Clark. We learned of
10 Mr. Clark's change of heart just prior to trial, changing
11 his testimony 180 degrees from what it was out of Mr.
12 Littrell. At that point we really began intensely -- our
13 pursuit of information with regards to Mr. Clark and I
14 believe this court can recall on several occasions in this
15 very room that we debated the existence of information with
16 regard to Mr. Clark and we were rebuffed on many occasions
17 in the pursuit of that information that would have
18 ultimately made what happened at trial somewhat less of an
19 error. It became an error of a scale that requires that
20 this court grant Mr. Grizzle a new trial.

21 There were admissions I think by the People that in
22 fact they have not -- or even talked to Mr. Clark. I think
23 that time's borne out that in fact Mr. Clark was not only
24 talked to but interviewed and taped by the People. There
25 were comments by Mr. Rogers of Internal Affairs that there
26 was just a reference to gang activity. We learned later
27 post trial that there's an entire transcript dating back to
28 January 5th of Mr. Clark's assertions that ultimately I

1 feel, and I know Mr. Grizzle feels, persuaded this jury that
2 the Aryan Brotherhood was an absolute vengeful organization
3 that could contemplate the death of a young child, and the
4 inappropriate linkage of Mr. Grizzle to that organization
5 ultimately resulted in a prejudice again that should
6 motivate this court to grant a new trial.

7 There was a significant effort by the defense to
8 learn everything about Mr. Clark and I think that there was
9 a great deal of energy put to shielding us from that
10 information, and our continued complaints I think have been
11 put before this court as having merit today by -- by the
12 existence of this transcript, by the existence of this tape,
13 and when the Court reflects back on assertions that in fact
14 certain contacts were not made, you have to look at the
15 credibility of those and look at the position that the
16 defense was put in, not only at trial but at this juncture
17 of the motion for new trial. Once Mr. Clark testified
18 without our ability to even begin to cross-examine on those
19 issues the damage was done.

20 I understand the Court's perception is "well, what
21 was there to gain, what did we learn." My point is, your
22 Honor, that there was quite a bit that could have been
23 learned and dealt with if we had had the opportunity to
24 confront Mr. Clark with the fact that Mr. Rogers had urged
25 both the Attorney General and Mr. Fallman to charge him with
26 perjury, that the jury would have known that. I think that
27 would have made a lot of difference. If we had known that
28 in fact this transcript existed or this tape existed we

1 would have -- we would have been able to prepare
2 cross-examination that would have persuaded this jury, I
3 believe, to look differently at Mr. Clark.

4 The fact of the matter is in this case that the
5 People attempted to rehabilitate all of these informants and
6 I believe that to some degree because of the lack of
7 information, because of the -- the manner in which we were
8 rebuffed in a number of our discovery requests and
9 arguments, that we were disarmed in our ability to take that
10 persuasive quality away from the People's arguments.
11 Ultimately it's resulted in conviction for Mr. Grizzle.
12 That can be remedied by the Court looking closely at the law
13 and not the emotions that have been operative, I think, to
14 some degree in this case.

15 I think the Court is frustrated and fatigued by a
16 number of the issues in this case and the way that we have
17 been put in the position of pursuing them that have in fact
18 swallowed up very valuable court time, but I don't think
19 there's any more valuable time than the time of a person who
20 is wrongly incarcerated and that's exactly what would happen
21 to Mr. Grizzle and I think that that certainly should shift
22 the perspective of merit to what this investigation and our
23 defense has attempted to do which is to try and get the
24 truth out.

25 I think that the Court has glimpsed from time to time
26 what we have proposed actually took place in this whole
27 affair. There was a great deal of law that we've used to
28 support that perspective. I urge the Court to closely look

1 at the precedents that we have put into our briefs and
2 separate itself from the frustrations that the Court may
3 have in the manner in which this case has proceeded.

4 I would rest with that.

5 THE COURT: All right, submit the matter then?

6 MR. FALLMAN: Yes, your Honor.

7 THE COURT: Both sides?

8 MR. CLANTON: Submit it, your Honor.

9 THE COURT: All right, first I'll address the issue
10 of the -- the supplemental points and authorities that were
11 filed yesterday to do with the defendant's neck tattoos, and
12 it's I think hornbook law that it is not a -- it is not
13 self-incrimination or is not compelling a person to testify
14 to require them to display some part of their body starting
15 with their face in an identification, for example. For
16 whatever -- whatever rights may be implicated, the Fifth
17 Amendment is not implicated by that. It's -- in this
18 situation, it was certainly relevant evidence which would
19 have had a tendency to bolster Ridinger's testimony that was
20 how he got started in his conversation with the defendant in
21 the first place, and secondly, the tattoos, which I don't
22 know that they've ever really been fully described for the
23 record, but they are tattoos running around the front
24 portion of the defendant's neck. I would say that they
25 probably are about one half the circumference of his neck,
26 they are probably an inch to an inch and a half in height
27 and so therefore they're probably six or eight inches in
28 length starting on the left side with a very prominent